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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. OMAR GONZALEZ, Defendant and Appellant.	A131949 (Alameda County Super. Ct. No. C160204)

Omar Gonzalez (appellant) appeals from a judgment entered after a jury convicted him of first degree murder (Pen. Code, § 187, subd. (a),[1] count 1), attempted murder (§ 187/664, count 3), and two counts of assault with a firearm (§ 245, subd. (a)(2), counts 4, 5), and the trial court sentenced him to 77 years to life in prison. He contends: (1) the court violated his due process rights when it had a deputy stationed by him while he testified in his own defense; (2) the evidence was insufficient to show premeditation and deliberation; and (3) the court erred in refusing to entertain his request to replace his attorney under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On January 13, 2009, an information was filed charging appellant with first degree murder of Rene Castillo (§ 187, subd. (a), count 1), attempted murder of Karina Najera and Nixon Ortega (§ 187/664, counts 2, 3), and assault with a firearm against Najera and

[1] All further statutory references are to the Penal Code unless otherwise stated.

Ortega (§ 245, subd. (a)(2), counts 4, 5). The information also charged firearm enhancements (§§ 12022.53, subds. (b), (c), (d), 12022.5).

The Shootings

At a jury trial, Maria Pedroza testified she met Rene Castillo, who was known as Droopy, in late 2000 in Oakland.[2] At the time, Pedroza was a teenager and she and Castillo were members of a gang, Border Brothers. Pedroza left Border Brothers in 2002 when she had her first son. Pedroza and Castillo were a couple as of the evening of June 22, 2001. Some of Castillo's friends included appellant, who was known as Trucha, Javier Valdovinos (Javier), known as Bola, Armando Valdovinos (Armando), known as Chucky, and Osmin Melgar-Valle, known as Galan. Neither Pedroza nor Castillo had any problems with appellant before June 23, 2001.

On June 22, 2001, Pedroza and Castillo were "hanging out" on the street when appellant invited them over to a body shop at which appellant lived with an older man known as Tio. Appellant hosted a party at the shop that night that continued into the next morning. Pedroza, Castillo, and several of their friends including Javier, Armando, and Karina Najera, known as China, went to the shop in Javier's van. There were many others at the party, including Edwin Lopez, known as Chino, Nixon Ortega, known as Mickey, and Melgar-Valle. Of Pedroza's group, Ortega, Javier, Armando, and Melgar-Valle were members of Border Brothers; Lopez was not. There was another person at the party known as Weapon who appeared to be friends with appellant and was a member of the South Garden faction of the Sureño gang. Pedroza did not know until that night that appellant was associated with the Sureño gang.

At first, everyone at the party seemed to be getting along and appellant appeared to be in a good mood. At some point after midnight, appellant and Castillo got into an argument after appellant replaced a non-gang related CD that was playing with a CD with

[2] Many of the witnesses in this case were known by a nickname. In this opinion, we will note the nicknames but will refer to all individuals by their last name, unless their given name is unknown. Where individuals share the same last name, we will refer to one or both of them by their first name to avoid confusion.

"Sureño lyrics." Castillo, who appeared unhappy that Sureño music was being played, removed the Sureño CD and replaced it with the music that was initially playing. In referring to the Sureño music, Castillo used the word "scrap"—a derogatory term for Sureños. Appellant became upset and he and Castillo yelled at each other. Castillo pulled out a screwdriver from his back pocket and tried to swing it at appellant, but was "kind of drunk" and did not make contact with appellant. Appellant picked up a tool and Javier and Pedroza held Castillo back. Pedroza testified, "Since it was [appellant's] house or shop or whatever, we decided since they got into an altercation, the party is over so we were going [to] leave." As they started to leave, appellant's friend Weapon grabbed Pedroza's arm as if to prevent them from leaving, and Castillo and Pedroza punched Weapon in the face. Castillo, Javier, and Pedroza then headed outside. Castillo, who was drunk, went inside Javier's van and passed out.

Pedroza went inside the shop again to look for Najera so they could go home together. At that point, Pedroza was not too worried because she thought Castillo and appellant had just had a "drunk argument" that would not escalate "to the level or the extent that it [did]." After looking around in the shop, including inside the bathroom, Pedroza found Najera and the two walked towards the hallway. There, she saw appellant walking out of the shop carrying a "long, brown, black" gun while saying, "Everybody get the fuck out or I'm going to kill everybody." Less than five minutes had gone by between the time appellant and Castillo argued about the music, and the time Pedroza saw appellant carrying a gun. As appellant walked outside, he screamed Castillo's name asking where he was. When Lopez, Javier, and Ortega tried to calm appellant down, appellant pointed the gun at Ortega. No one other than appellant, who had a gun, and Tio, who was carrying a machete, had any weapons.

Javier told Castillo to run. Castillo got out of the van and appellant chased him around the van. Castillo then ran into the middle of the street in an attempt to get away, and appellant pointed the gun at Castillo. Pedroza looked away, and a second or two later, she heard a shot, and heard Castillo scream. She then heard a second shot, and heard Najera, who was also shot, scream. Javier and Melgar-Valle were also injured.

Pedroza was hit in the leg by "a pellet or something" and fell as she tried to run away. After the shots were fired, appellant ran into the shop with the gun. Tio and Weapon also went back inside. Immediately after the shooting, Armando took Castillo around the corner to the driveway of a house. Castillo had a gunshot wound to his chest and was bleeding. Javier and another individual known as Hermano tried to break into a nearby car in order to get Castillo to the hospital but were unsuccessful in trying to get the car started.

As soon as police arrived, Pedroza told the police that appellant had shot Castillo; she was "[a] hundred percent positive" that appellant had shot Castillo as Castillo was running away. The police placed many of the people who had been at the party in separate cars and took them to the police station. A few people, including Javier and Melgar-Valle, had left the area before police arrived. Pedroza was interviewed by police and provided a detailed description of appellant. When her interview was over, she learned that Castillo had died.[3] There was a Border Brothers memorial set up for Castillo with candles, flowers, and balloons, and a viewing that was attended by Border Brothers members and others. Castillo was loved by many.

Pedroza testified that Border Brothers members who "dropp[ed] out" of the gang were referred to as "dropouts." Members could "jump[] out" of the gang by taking a beating for leaving. They would be physically injured, but would not be killed. The gang did not refer to members as dropouts if they were simply getting older and trying to start a family or settle down; the gang respected this as a reason to leave. At the time he was killed, Castillo was thinking of "stepping back" from—but not leaving—Border Brothers because he was getting older, had a job, and wanted to settle down.

Edwin Lopez testified he was married to Reyna Lopez (Reyna) in 2001. At that time, he was close friends with Ortega and was still friends with him at the time of trial. Lopez was not a member of Border Brothers but "[u]sed to hang around them." As of June 2001, he had known Castillo for three or four years. On June 23, 2001, he had

[3] The parties stipulated that Castillo was pronounced dead by doctors at Highland Hospital in Oakland at approximately 4:28 a.m. on June 23, 2001.

known appellant for no longer than a month. On that day, Lopez, Reyna, Ortega, and Ortega's wife drove to a party in Ortega's car. The party was hosted by appellant at a shop at which Lopez believed appellant lived. There were a number of individuals at the party, including an older man who appellant referred to as "Tio," or "uncle," and a man known as Weapon who Lopez had not seen before. At some point after midnight, Lopez and Ortega left the party to buy beer and cigarettes. When they returned there was a lot of commotion and an argument going on. He saw Castillo come out of a building and go inside Javier's van. Lopez then came face-to-face with appellant, who came outside holding a rifle and appeared angry. When Lopez asked if they could talk about what was going on, appellant responded in Spanish, "Get out of the way or else," as he pointed the rifle against Lopez's forehead. Lopez was scared, got out of the way, and jumped backwards towards the door of the building. He saw Castillo get out of the van and try to hide, then run. Appellant was chasing Castillo around the van saying, "I'm going to get you," while holding the rifle. Lopez heard about three gunshots and heard Castillo scream. At one point, Lopez saw appellant make a movement with his arm as if he was "[m]aybe loading [the gun] again." The only other person he saw with any weapons that night was Tio, who had a machete. After he heard Castillo scream, Lopez looked for and found Reyna, and the two went over to where Castillo was laying on a driveway. Castillo was bleeding and had a hole in his chest and back. His voice was "[r]eally weak" but he said, "He shot me. He killed me. Trucha."

Police responded to the area and separated the group. Lopez initially told police he did not see who shot Castillo, even though that was not true, because he was upset and afraid of being labeled a snitch. During an in-person interview at the police station, he gave police the name "Trucha," and later identified appellant in a photographic lineup. Lopez was called as a witness at a preliminary hearing in January 2009. After testifying at that hearing, Lopez "heard from one of [his] cousins" about possible threats about testifying which caused him fear. Despite that fear, he was testifying at trial under subpoena.

Nixon Ortega testified he joined Border Brothers in about 1995 and used to be a leader in one of the cliques. He was convicted in 1996 of a felony for aiding and abetting someone who discharged a firearm that did not cause injury. He was on misdemeanor probation at the time of trial for driving under the influence. He left Border Brothers gradually, "[o]ver a length of time," after his children were born and he decided to move away for the sake of his family. As of June 2001, he was still associated with Border Brothers, although he was not "active," but rather, "back and forth." The Border Brothers' main enemies were the Norteños. Between 1995 and 2001, Border Brothers did not have problems with Sureños and "it wasn't a big deal." Members of both gangs would "hang out. Used to be with their friends, go over and trip with them every day." There were occasional fights but "nobody was pulling out weapons or killing each other."

Ortega further testified that Border Brothers had a system known as "jump ins" and "jump outs," which meant that someone who wanted to join Border Brothers would get beaten in order to join, and beaten if they decided to leave. Border Brothers did not have a "blood in, blood out" policy under which someone who wanted to join a gang had to kill someone to get in, and to get out. There were two ways of leaving Border Brothers; one way would be to "get jumped out" by getting a "pretty good beating," and the other way was to "move away and fade away," which is what Ortega did.

Ortega met Castillo when Castillo was 13 or 14 years old. In 2001, Castillo was a Border Brothers member and had a job. Ortega met appellant, whom he knew as Trucha, in 1994 or 1995, before Ortega joined Border Brothers. They were not friends but became reacquainted in 2001 through one of Ortega's friends. Appellant and Castillo also knew each other, and neither Ortega nor Castillo had any problems with appellant before June 23, 2001. A week before the June 23, 2001, incident, Ortega and his wife went to a picnic and saw appellant there. That week, Ortega went to a welding shop at which appellant lived, where appellant showed him a long rifle with a wood shaft.

On the evening of June 22, 2001, Ortega was "hanging out" "just drinking outside," when appellant called Ortega on his phone and invited "everybody" over to "just drink inside instead of outside." There were many people at the party, including a

"new guy" who called himself Weapon. Ortega learned that Weapon was associated with or in a gang when Weapon started "screaming 'South Side. South Garden,' " which refers to the Sureños gang in Hayward. Almost all of the Border Brothers members "wanted to beat [Weapon] up" when Weapon "started screaming 'South Garden,' " but Ortega told them not to. Things settled down after Ortega had a talk with Weapon.

Right before 2 a.m., Ortega and several others left the party to get more beer for the group. Everything seemed fine when they returned. When Ortega realized he had forgotten to buy cigarettes, he headed back to the store; appellant told him to "hurry up." When Ortega returned the second time, "[e]verybody" was outside, and Castillo, who had a metal file in his hand, said, " 'I whupped his ass.' " Ortega took the metal file away from Castillo and told him he "didn't need that." As Ortega was talking to Castillo, Weapon came out from somewhere "saying something." Castillo said, "I'm going to whup his ass," and Ortega told Castillo to "go for it." Castillo ran up to Weapon and "kicked his ass in the middle of the street" by hitting him a few times. Weapon ran away screaming, and Castillo went inside the van. Then appellant came outside holding a big rifle. Tio came out and stood by the door with a machete in his hand.

Melgar-Valle went up to appellant and told him to put the gun down; appellant swung the butt of the gun and hit Melgar-Valle in the face. Ortega said to appellant, " 'what the hell you doing? Put that away.' " Appellant "looked at [Ortega] funny, pointed the weapon [at Ortega's face], and pulled the trigger." The gun clicked but did not fire. Ortega ducked and tried to get away, and appellant pulled the trigger again. Ortega went towards the van but "kept looking back," wondering why the gun was not going off. Appellant then appeared to have "figured it out," and "pumped up" the gun. Ortega ran towards the van and in between the van and the wall, and stood in an alleyway. Ortega heard appellant asking where Castillo was, and someone told Castillo to leave and run. Ortega heard a shot. He looked back and saw appellant put another bullet in the chamber. Ortega "got like chills" when he saw appellant pointing the gun. Ortega heard a second shot and thought he had been shot, but realized Najera was the one who had been shot. He did feel something warm and later learned when a police officer

pointed it out to him, that he had also suffered an injury to his leg. At the time, Ortega was running for his life and concerned about his own safety, and did not see Castillo get out of the van or being chased around by appellant.

Ortega picked Najera up, put her on his shoulder, and took her around the block into someone's driveway. As he ran back towards the shop to see where Castillo was, he saw Armando carrying Castillo under his shoulder. Ortega heard about two more shots. Castillo "had blood all over in the front" and was saying, "This fucker killed me. He got me." Ortega threw Castillo over his shoulder and took him around the corner to where Najera was, then returned to the shop to look for his wife. He called 911. At that point, he knew Castillo was seriously injured so he was screaming to the person on the line that his friend "got shot or killed." When he returned to the shop, he saw Lopez telling appellant, "that's enough, . . . fuck off, leave them alone, you already got him." Appellant, who still had the rifle in his hand, responded, "Get the fuck out of my way before I fucking kill you too," then walked back inside the shop. Ortega met with his wife at their car and they picked everyone up and drove to where Castillo was.

The police arrived and separated the group, and moved them away from Castillo. Ortega was interviewed by police at the police station. Later, he tried on his own to get information about who appellant was associated with, and Ortega and other Border Brothers members tried to find appellant in order to "pay[] him back," i.e., kill him for killing their friend. They never found him. Castillo's death was a key factor in Ortega's decision to move away from the gang life. At the time of trial, he did not feel at all like he wanted to kill appellant because he was "[p]ast that point."

Fattemeh Ortega (Tammy) testified that she and her mother moved from Iran to the United States when she was six months old. She had a bachelor's degree in nursing/health science and worked in the medical field, had never been arrested, and was never involved in a gang. She knew appellant through her husband and had never had a problem with him until the night of the shooting. She remembered seeing appellant at a picnic about a week before the incident and chatting with him. She also recalled that during a visit to the shop at which appellant lived, appellant was "showing . . . off" a gun.

Tammy testified that on the night of the incident, Castillo and appellant got into an argument. Castillo had a screwdriver and appellant had a piece of metal and were confronting each other. Tammy left the shop to unlock her car so that she "could get out of there" "[i]n case anything happened." Minutes later, she saw appellant leave the shop carrying a long gun. When Melgar-Valle told appellant to stop, appellant hit him in the head with the gun. People were screaming at appellant to calm down, and Lopez tried to intervene. Tammy saw appellant holding the gun when she heard shots fired. She moved behind a car and heard more shots. Appellant was the only person with a gun. Appellant chased Castillo around the van and more shots were fired. Appellant went back inside the shop, then left the shop with Weapon, and the two ran off. Tammy called the police. Ortega wanted to drive after appellant, but everyone stopped him. Tammy later saw Castillo on a driveway. People were telling her "help him, help him. And I went over to him. And he just was looking at me. And I just . . . looked at him and said 'sorry' because I knew I couldn't do anything."

The Aftermath, Investigation and Arrest

Oakland Police Officer Victor Garcia testified that at approximately 2:54 a.m. on June 23, 2001, he and his partner Bryan Hubbard were on patrol when they received a dispatch that more than one 911 call had come in regarding a shooting. Two minutes after receiving the dispatch, Garcia and Hubbard arrived at the scene where there was a crowd of five to 10 people flagging them down. There was a man laying face down who appeared to have been shot, a girl in the crowd who was crying and saying the victim, Castillo, had been shot, and another girl, Najera, who appeared to have also been shot in the leg or the legs. Everyone said "Trucha" was the shooter and that he was in a building around the corner. When an ambulance arrived a couple of minutes later and medical personnel turned Castillo's body over, Garcia saw a baseball-sized hole in Castillo's chest, and could see Castillo's heart beating inside his chest. Fire department personnel tended to Najera's injuries, and Garcia learned that Ortega had also suffered some fragment wounds.

Based on information given to him, Garcia conducted a "search or protective sweep" for "Trucha." He and other officers entered a metal shop that the crowd had described by entering through an unlocked and slightly open front door. On the way to the shop, Garcia saw a blood trail, some casings, and a bone fragment on the ground. There was no one inside the shop. Another officer found a bolt-action rifle.

Pathologist Clifford Tschetter, M.D., testified that he performed an autopsy on Castillo and found gunshot wounds from two bullets that were fired from a "high-power gun" with "high-power ammunition." Both gunshot wounds were consistent with Castillo moving away from the shooter, and both wounds were inflicted before his death. The gunshot wound of the chest was the cause of death.

Oakland Police Sergeant Phil Green testified that he received a "homicide callout" at about 4 a.m. on June 23, 2001. He and his partner Brian Medeiros conducted an investigation which included separate recorded interviews of Ortega, Tammy, Pedroza, Lopez, and Reyna, all of whom provided detailed descriptions of the shooter, "Trucha." On August 8, 2001, Green called Tammy to schedule a photographic lineup at her house. She told him that her husband, as well as Lopez and Reyna, would be there. Green separately showed the four of them a photographic lineup, and everyone identified appellant as the shooter.

Medeiros testified that Lopez provided him and Green with a pager number for "Trucha," and that Medeiros paged "Trucha" to call Medeiros's cell phone. Eight minutes later, Medeiros received a call and asked the caller if he was "Trucha"; the caller replied, "yes." Medeiros identified himself as police and asked the caller "if he was okay, to try to get him to talk to me. Asked if he was injured." The caller said he was not injured, "said he didn't know what I wanted to talk about, and . . . hung up."

Salvador Rodriguez testified he is married to appellant's sister, Rina, and is therefore appellant's brother-in-law. Rodriguez called appellant by his middle name Danilo.[4] Appellant sometimes helped out around Rodriguez's welding shop and lived

[4] Appellant's full name is Omar Danilo Gonzalez.

there for a month or a month and a half before the June 23, 2001 incident. Rodriguez's uncle, Luis Montoya, also lived at the shop. The morning after the incident, appellant came to Rodriguez's house when Rodriguez was asleep and knocked on the window. Appellant said he had some problems at the shop and had to leave. Rodriguez did not ask—and appellant did not say—where he was going. Later that morning, Rodriguez learned from police that there had been a shooting. A few days after that, someone with a cane showed up at the shop twice looking for appellant. Rodriguez also saw some gang members in front of his house. Rodriguez feared for his children and moved his family to Manteca. He had not seen appellant since.

Jimmy Castillo (Jimmy) testified that he sometimes "help[ed] out around [Rodriguez's metal] shop." Jimmy knew Rodriguez's brother-in-law Danilo who lived in the shop with a man named Tio. Jimmy remembered seeing a machete at the shop but had not seen any other weapons there. Some time after June 23, 2001, he heard that someone with the same last name as his, Castillo—but with no relation to him—had been shot on June 23, 2001. After the shooting, Jimmy never saw Danilo again. Shortly after the shooting, Jimmy was at the shop when some gang members who "[m]ight have been [from] Border Brothers" approached him, asking whether he was related to Danilo. Jimmy thought they were going to attack him, but they did not. In early to mid-July 2001, Jimmy received a phone call from Danilo who said "something went wrong or he got in trouble, or something like that," and asked Jimmy to get some of his clothes for him from the shop. Danilo did not provide any details but said he was in Arizona. Because Jimmy did not want to "get involved" in "whatever situation [Danilo] was in or had happened," he said he was not sure if he could help.

On October 1, 2008, Oakland Police Officer Rhonda Bowden traveled to Houston, Texas, to extradite appellant who was in custody there. Alameda County Sheriff's Office employee Jose Rosas testified he monitored inmate mail as part of his duties. While reviewing appellant's outgoing mail, he discovered a letter appellant had written which revealed the circumstances surrounding appellant's arrest. In the letter, appellant stated he was arrested by Houston police after a woman reported that appellant had hit her. The

woman informed police that appellant's real name was Danilo Gonzalez and that he was from Oakland and had some problems there. Houston police found an Oakland arrest warrant for Danilo Gonzalez, but appellant had a different name, driver's license, and social security number in Texas. When a picture came back from California that looked like appellant, the police arrested him on a domestic violence charge. Rosas further testified that he also flagged an outgoing letter from appellant to a Jose Guadarrama in San Francisco. In that letter, appellant listed witnesses in his pending murder trial and an address for Edwin Lopez. The letter listed Lopez, Ortega, and Tammy as witnesses with a statement about the case and the word "snitch" written next to each. The word "snitch" had been written in pencil and erased, but it was clear that was the word that was initially there.

Appellant's Testimony

Appellant testified through an interpreter that he came to the United States from El Salvador in 1996 and was living in Oakland in 2001. Between 1996 and 2001, he worked fixing boats at a boat yard in Alameda and also fixed cars "as a mechanic whenever there was work." Appellant was never friends with any Border Brothers members but knew who they were because "they used to hang around in the area where [appellant] used to live." On one occasion before June 2001, Ortega approached appellant and told him he "would have troubles" if he did not join the gang, but appellant refused to join.

In 2001, appellant was living at a welding shop with Luis Montoya, an uncle of appellant's brother-in-law, Salvador Rodriguez. Appellant never hosted any parties at the shop. On the evening of June 22, 2001, Armando asked appellant to take a look at his van; appellant agreed to do so. As appellant worked on the van, he overheard Armando talking on his cell phone and saying that someone wanted to leave the Border Brothers gang. Appellant continued to work on the van and when he was done, he went back inside the shop and into the bathroom to wash the grease off his hands and to use the bathroom. While he was in the bathroom, he heard some shots. He was still sitting on the toilet and was not able to see who did the shooting. He was in the bathroom for about

20 to 25 minutes. When he went outside to see what was happening, he saw Lopez carrying a rifle that appellant had never seen before. He did not see anyone who appeared to be injured. Appellant told Lopez to put the gun down, grabbed it by the tip, and put it by the door at the entrance. He then went to wake Montoya up, told him he was leaving, and asked him to lock the door after appellant left. At that point, Ortega approached appellant and asked where the gun was. When appellant responded that the gun was inside, Ortega said he wanted it back, then hit appellant in the face. Appellant fell on the floor, and, as he attempted to get up, someone else hit him on the head with something. Appellant got up again and ran to his sister's house and was able to get away. About three days later, he left California after his sister told him that gang members were in front of her house looking for him. He went to Texas and did not return until the police took him into custody and brought him back to Oakland in 2008.

On cross-examination, appellant testified he never had much contact with anyone in Border Brothers. He recognized Lopez, but did not know who Pedroza was in June 2001, and did not know anyone with the nicknames Droopy, Bola, or Galan. The only person he knew was Armando, whom he had seen a few times and whose van he fixed on one occasion. Appellant did not know who Tammy Ortega was in 2001, and did not remember going to a picnic that she also attended. He did not recall seeing her at his shop about a week before June 23, 2001. He did not show her a rifle; he had never owned one. Appellant also did not know Ortega, but knew his nickname was Weapon because he "just remember[ed] that they would call him Weapon."

Appellant testified he was interviewed by police in English in connection with this case and that he did not understand some of what was said because his English is not very good. He testified he does not know how to read or write in English. When shown a letter he had written to a judge in English, appellant responded that he was able to write that letter only because he had someone translate his Spanish letter into English, and he then rewrote the letter in English in his own handwriting. Appellant acknowledged that when his jail cell was searched, there were a lot of papers that were written in English, some of which were written in English in appellant's handwriting.

Appellant testified that people did not call him Trucha and that was not his nickname in June 2001. People from El Salvador are called Salvatruchas, and he was sometimes called Salvatrucha, but not Trucha. He was always called Danny. When he was in Texas, he went by the name Raul Miramontes and had false papers, including a driver's license, relating to that name.

Appellant further testified he was not familiar with the South Garden Sureños gang or with South Side and was not familiar with Sureños tattoos. He testified that the tattoo on his hand was "nothing," and that "another kid" had put it on him when he was little. He did not know what Sureños music was, and did not know that their gang color was blue. He never had parties at the shop but allowed people to come in to use the bathroom; sometimes they came in with beer. He testified that on the night of the incident, he had been in the bathroom for only a few minutes when he heard what sounded like gunshots. He then waited another 15 to 25 minutes before leaving the bathroom because he was sitting on the toilet and "had to finish." He was not scared because he was not sure they were gunshots. When he went outside, he saw Lopez carrying a rifle and aiming towards 86th Avenue. There were many people arguing on the corner of 86th Avenue. He did not go back inside and lock the door; instead, he asked Lopez what was going on. After grabbing the gun from Lopez, he left the gun inside the doorway and the door closed by itself. He did not lock the door.

Rebuttal

Oakland Police Officer Eugene Guerrero testified as an expert in the investigation of gang-related crimes in Oakland. He testified that Sureño music promotes the Sureño gang and puts down members of other gangs. Playing it in the presence of Border Brothers members would be a sign of disrespect, and removing and replacing the Sureño CD with another CD would also be seen as disrespect and the situation could escalate. Guerrero further testified that a Border Brothers member could leave the gang in one of two ways. If the reason for leaving was questionable, the member would be "jumped out, where he [would be] . . . physically assaulted by the members of his gang. Basically they're going to teach him a lesson in this beating." "Another way is when some of the

gang members get older, they get married, they have children, they get a job, and they kind of sort of fade away from the gang lifestyle. And that's usually a more acceptable way to leave a gang." Border Brothers had never killed a member who wanted to leave the gang. Guerrero had never heard anything suggesting that Border Brothers had killed Castillo for wanting to leave the gang. In fact, Border Brothers members were very upset about Castillo's death and wanted to avenge his death. Guerrero also observed that Border Brothers had placed graffiti memorials for Castillo on 83rd and 86th Avenues, and on E Street in Oakland.

Oakland Police Sergeant Gus Galindo interviewed appellant after his arrest. Appellant told him that he knew the three dot tattoo on his hand could be for Sureños, and also acknowledged he was sometimes called Trucha. Galindo testified that the three dot tattoo on appellant's hand is usually indicative of Sureño membership.

Verdict and Sentencing

The jury found appellant guilty on counts 1 (first degree murder of Castillo), 3 (attempted murder of Ortega), 4 and 5 (assault with a firearm against Najera and Ortega), and acquitted him of count 2 (attempted murder of Najera). The jury found the firearm enhancements to be true as to the guilty counts. The court sentenced appellant to a prison term of 77 years to life, consisting of 25 years to life on count 1 plus an additional 25 years to life for the firearm enhancement on that count, and seven years on count 3 plus an additional 20 years for the firearm enhancement on that count. Concurrent sentences were imposed on counts 4 and 5.

DISCUSSION

1. *Deputy's Presence During Appellant's Testimony*

Appellant contends the trial court violated his due process rights when it had a deputy stationed by him while he testified in his own defense. We agree the court erred, but conclude the error was harmless.

a. Background

Before appellant testified, defense counsel objected to the "practice of this court that when a defendant who is in custody is testifying, that a [deputy] sit nearby him" in

the witness box. The court responded, "I don't think the jury will draw any adverse conclusions. I mean there have been two deputies in the courtroom for every single session that we've had. [¶] And what happens is right up here, it's very close proximity between the judge and the person testifying. It's probably less than five feet. And so for court security, and this is the practice of this court, for court security I always have someone here. [¶] But what I will do, I will tell them not to hold it against Mr. Gonzalez, not to draw any adverse conclusions from the fact that a deputy is here. I'm going to just say this is the practice of this court."

The prosecutor went on to provide the court with facts regarding appellant and his jail custody that might provide a basis for the court's security, stating appellant was in the "highest security class in crime class because of the charges in this case" and was "also in administrative segregation which may have to do with some of the gang nature." The prosecutor added that appellant had a "violation for being in an unauthorized area," "had a loss of privilege for excessive linen," "stockpiling food," and "for covered windows in his cell," and "was involved in an incident of fighting with injury." The court did not comment on the information provided by the prosecutor but reiterated, "It's the practice of this Court for court security. And remember that case not too long ago where the inmate reached over and stabbed the judge in the courtroom? I'm not saying that anything like that is going to happen here, but that was one of the other things that made me keenly aware that we should protect everyone in here, including Mr. Gonzalez . . . ." During a break in appellant's testimony, the court stated, "And previously, ladies and gentlemen, I was to tell you that it is a court policy that whenever a person accused of a crime is testifying, that the deputy must be up here. Please don't hold it against Mr. Gonzalez or draw any adverse conclusions from that fact." Later, the court instructed the jury with a modified version of CALCRIM No. 204 that the jury was not to draw any inference against appellant based on the presence of the deputy. The court instructed: "The fact that a deputy was seated behind the defendant during the defendant's testimony is not evidence. Do not speculate about the reason. You must

completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or . . . discuss it during your deliberations."

b. Analysis

In *People v. Stevens* (2009) 47 Cal.4th 625, 629 (*Stevens*), our Supreme Court held that "the stationing of a courtroom deputy next to a testifying defendant is not an inherently prejudicial practice that must be justified by a showing of manifest need." The court stated: "[V]isible physical restraints must survive heightened scrutiny and be justified by a particular need." (*Id.* at p. 633.) "But the stringent showing required for physical restraints like shackles is the exception, not the rule." (*Ibid*.) "While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable." (*Id*. at p. 635.) "Although a deputy's presence next to a testifying defendant may be viewed as a defendant-focused practice when officers do not accompany other witnesses to the stand, . . . [the fact that] a security practice seems to focus attention on the defendant is not enough, without more, to render the practice inherently prejudicial." (*Id.* at p. 638.) "[S]o long as the deputy maintains a respectful distance from the defendant and does not behave in a manner that distracts from, or appears to comment on, the defendant's testimony, a court's decision to permit a deputy's presence near the defendant at the witness stand is consistent with the decorum of courtroom proceedings." (*Id.* at p. 639, fn. omitted.)

Despite its conclusion that the practice was not inherently prejudicial, however, the Supreme Court in *Stevens* cautioned that "the trial court must exercise its own discretion in ordering such a procedure and may not simply defer to a generic policy." The Supreme Court explained: "The [trial] court may not defer decisionmaking authority to law enforcement officers, but must exercise its own discretion to determine whether a given security measure is appropriate on a case-by-case basis. [Citations.] . . . [T]he trial court has the first responsibility of balancing the need for heightened security against the risk that additional precautions will prejudice the accused in the eyes of the jury. . . . The

trial court should state its reasons for stationing a guard at or near the witness stand and explain on the record why the need for this security measure outweighs potential prejudice to the testifying defendant. In addition, although we impose no sua sponte duty for it to do so, the court should consider, upon request, giving a cautionary instruction, either at the time of the defendant's testimony or with closing instructions, telling the jury to disregard security measures related to the defendant's custodial status." (*Stevens, supra,* 47 Cal.4th at p. 642.)

Applying the above principles, the Supreme Court in *People v. Hernandez* (2011) 51 Cal.4th 733, 741 (*Hernandez*), concluded that the trial court's decision to station a deputy near the defendant during the defendant's testimony was an abuse of discretion because it "was not based on a thoughtful, case-specific consideration of the need for heightened security, or of the potential prejudice that might result." Noting that the trial court's remarks in that case "reveal[ed] that the court was following a general policy of stationing a courtroom officer at the witness stand during *any* criminal defendant's testimony, regardless of specific facts about the defendant or the nature of the alleged crime," the Supreme Court concluded: "Where it is clear that a heightened security measure was ordered based on a standing practice, the order constitutes an abuse of discretion, and an appellate court will not examine the record in search of valid, case-specific reasons to support the order." (*Id.* at pp. 743, 744.)

The Supreme Court further held that because the stationing of an officer at the witness stand during a defendant's testimony is not an inherently prejudicial practice and the error in failing to make a record of case-specific reasons for ordering that procedure is one of state law, it is properly reviewed under *People v. Watson* (1956) 46 Cal.2d 818. (*Hernandez, supra,* 51 Cal.4th at p. 745.) The Supreme Court concluded the error was harmless, stating: "Defendant was monitored by a single deputy, and, as in *Stevens, supra,* 47 Cal.4th at page 639 and footnote 6, nothing in the record suggests that this deputy's demeanor was anything other than respectful and appropriate." (*Id.* at p. 746.)

Here, as in *Hernandez,* the trial court stated it was the policy of the court to station a deputy by the witness box while a criminal defendant testified. Even after the

prosecutor tried to provide case specific facts relating to appellant that might have potentially justified the presence of a deputy, the court did not state its reasons for implementing the practice in this particular case and did not state why the need for the security measure outweighed the potential prejudice to appellant. Rather it reiterated that it was stationing the deputy near appellant pursuant to "the practice of this Court, for court security," and went on to describe a situation—unrelated to the instant case—in which an "inmate reached over and stabbed the judge in the courtroom." The court acknowledged, "I'm not saying that anything like that [i.e., a stabbing,] is going to happen here." In the admonition it gave to the jury, the court described the deputy's presence as "court policy." By not considering appellant's individual case factors and the potential prejudice to him before employing this security measure, the court abused its discretion.[5]

We conclude, however, that the error was harmless because it is not reasonably probable that appellant would have obtained a more favorable result absent this error. (See *Hernandez, supra,* 51 Cal.4th at p. 745, citing *People v. Watson*, *supra*, 46 Cal.2d 818.) As in *Hernandez,* there was only one deputy and there is nothing suggesting the "deputy's demeanor was anything other than respectful and appropriate." (*Hernandez, supra,* at p. 746.) In addition, the jury likely believed the court's admonition that "it is a court policy that whenever a person accused of a crime is testifying, that the deputy must be up here." Moreover, the jury was properly admonished not to draw any inference against appellant based on the presence of the deputy sheriff, and we presume the jury followed this admonition.

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[5] After the parties rested, and during a conference regarding jury instructions, the court purported to "augment" the "hearing" regarding the presence of the deputy by stating, ". . . with the classification of Mr. Gonzalez and with the fact of the gang testimony, the Court felt that in this particular case there was a need to have . . . a deputy . . . seated behind him. And . . . no one really paid that much attention to the fact that he was there." This statement, made long after appellant had left the stand, and after repeated references to the deputy's presence as being pursuant to court policy, does not show the court conducted a case specific analysis that the security measure was appropriate.

Appellant acknowledges the holdings in *Stevens* and *Hernandez* but nevertheless argues, without much analysis or citation to relevant authority, that the stationing of the deputy near him during his testimony constituted a denial of due process.[6] To the extent appellant is asking this court to hold that a test other than that specified in *Hernandez* is applicable, we are, of course, bound by the decision of the Supreme Court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Appellant also asserts that there was a particularly "strong[] case for prejudice" here because the case turned on appellant's credibility as a witness. He states, "The deputy undermined appellant's credibility and labeled him as dangerous and guilty before the jury." "[T]he message to the jury that undermined the presumption of innocence [was] extremely telling, because no other witnesses were accompanied by a deputy, including Nixon Ortega, who actually testified that he wanted to kill appellant."[7] However, in *Hernandez*, where the defendant argued prejudice based on the fact that the case turned on the credibility of appellant versus that of the victim, the Supreme Court explained: "[T]his aspect of the case is not unique. 'In nearly every case when an accused testifies in his own defense, the jury will have to weigh the credibility of the defendant and the alleged victim [or other prosecution witnesses].' " (*Hernandez, supra*, 51 Cal.4th at p. 746, quoting *Stevens, supra*, 47 Cal.4th at p. 641.)

Finally, the evidence presented at trial strongly supported the jury's verdict. (See *Hernandez, supra*, 51 Cal.4th at p. 747.) Four eyewitnesses saw appellant with a rifle, looking for, screaming for, or chasing Castillo after Castillo disrespected appellant and/or his friend Weapon. They saw him either shoot Castillo or heard the gun fire at the time

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[6] He points out that two justices in *Hernandez* believed the *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18) should apply. (*Hernandez, supra*, 51 Cal.4th at p. 750 (conc. & dis.opn. of Moreno, J.).)

[7] As noted, Ortega testified that he and other Border Brothers members tried to find appellant in order to "pay[] him back," i.e., kill him for killing their friend. However, by the time the trial took place 10 years after the incident, Ortega had left the gang and did not feel at all like he wanted to kill appellant because he was "past that point."

or immediately after they saw the gun in appellant's hands. They testified that no one else had a gun. Moreover, several witnesses, including a gang expert, testified that the Border Brothers gang allowed older members who want to settle down to retreat from the gang without consequence. The expert also testified that based on the fact that Border Brothers had never killed a member for simply dropping out, and that the gang had placed shrines in honor of Castillo, he believed Castillo was not killed by one of his own. Based on this testimony, the jury could reasonably discredit the defense theory that Castillo was killed by Border Brothers for wanting to leave the gang. The jury could also reasonably disbelieve appellant's testimony that he allowed a large group of strangers he believed were gang members to wander through his residence and his brother-in-law's place of business after midnight while he spent 20 to 25 minutes in the bathroom, mostly on the toilet, then walked outside after hearing gunshots, took a gun away from someone who surrendered it without resistance, then placed the gun by an unlocked door before going back inside. We conclude it is not reasonably probable that appellant would have obtained a more favorable result absent the presence of the deputy near him while he testified.

2. *Sufficiency of the Evidence*

Appellant contends the evidence was insufficient to show premeditation and deliberation. We disagree.

In determining whether there is sufficient evidence to support the finding of premeditated and deliberate murder, " '[w]e review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] In cases in which the People rely primarily on circumstantial evidence, the standard of review is the same. [Citations.]' [Citation.] ' "An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise." ' " (*People v. Solomon* (2010) 49 Cal.4th 792, 811-812.) The reviewing court must also give due deference to the trier of fact and not substitute its own

evaluation of a witness's credibility for that of the fact finder. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.)

"Given the presumption that an unjustified killing of a human being constitutes murder of the second, rather than of the first, degree, and the clear legislative intention to differentiate between first and second degree murder, we must determine in any case of circumstantial evidence whether the proof is such as will furnish *a reasonable foundation* for an inference of premeditation and deliberation [citation], or whether it 'leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation.' " (*People v. Anderson* (1968) 70 Cal.2d 15, 25.) To that end, *Anderson* identified three categories of evidence relevant to evaluating premeditation: planning activity, motive, and manner of killing. (*Id*. at pp. 26-27.) The *Anderson* analysis is "intended only as a framework to aid in appellate review; it [does] not propose to define the elements of first degree murder or alter the substantive law of murder in any way." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

Here, there was ample evidence that appellant "made a cold and calculated decision" to take Castillo's life. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) Tension first began to build when appellant's friend Weapon gave a gang yell, making clear he was associated with or in the Sureños gang. Things calmed down for some time but escalated once again when Castillo and appellant began to argue over gang music, and both pulled out tools intended to be used as weapons. Further disrespect of appellant and conflict occurred when Pedroza and Castillo punched Weapon and Castillo "kicked [Weapon's] ass in the middle of the street," sending Weapon off screaming. Appellant then came outside, holding a "high-power gun" with "high-power ammunition." Appellant asserts there was no "believable motive" in this case. However, while motive is a factor to consider in determining whether murder was in the first or second degree (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27), it is not an element of first degree murder (*People v. Solomon*, *supra*, 49 Cal.4th at p. 816). Moreover, there was evidence that Castillo not only disrespected appellant in front of others, but also punched and hit

appellant's friend. In light of that evidence, and based on the gang expert's testimony that conflict regarding gang music or the use of derogatory words against a gang could escalate, there also existed a motive for the crime.

Appellant also asserts the evidence does not show sufficient planning because "[t]he conflict arose quickly and unexpectedly without any warning or prior history of discontent." However, " ' "[t]he process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' " ' " (*People v. Young* (2005) 34 Cal.4th 1149, 1182.) When appellant came outside with a gun, Lopez, Javier, Melgar-Valle, and Ortega all tried to calm him down. Not persuaded, appellant pointed the gun at Lopez, struck Melgar-Valle in the face with the gun, and unsuccessfully tried to shoot Ortega. He then screamed and yelled for Castillo, chased him around the van telling him he was going to get him, before finally shooting Castillo in the back as he fled. Thus, there was sufficient evidence that appellant decided to kill Castillo and went to considerable effort, and overcame numerous attempts to stop him in order to accomplish his goal. This was deliberate and premeditated murder.

Further, that the evidence might also support an inference that appellant shot Castillo in a rash and impulsive—rather than a calculated—manner does not preclude the jury's reasonable finding that the killing was deliberate and premeditated. (*People v. Young*, *supra*, 34 Cal.4th at p. 1184; *People v. Guerra* (2006) 37 Cal.4th 1067, 1129.) It is for the jury to resolve the inconsistencies. (*People v. Solomon*, *supra*, 49 Cal.4th at p. 818.) Where, as here, the circumstances justify the jury's findings, the verdict shall not be set aside just because the circumstances might also be reasonably reconciled with a different verdict. (*People v. Guerra*, *supra*, at p. 1129.)

3. Marsden *Motion*

Appellant contends the court erred in refusing to entertain his request to discharge his attorney under *Marsden*, *supra*, 2 Cal.3d 118 before sentencing. We disagree.

a. Background

At the beginning of a court day, the trial court stated, "On the record outside the presence of the jury. We've gotten a note that the jury has a verdict. [¶] Mr. Gonzalez, did you have something that you wanted to say to the Court?" Appellant responded, "I'd like to request a *Marsden* motion." The court asked, "What has happened between the time that we left here and now? I haven't seen you for two days. The jury's been out deliberating. Have you had any contact with [defense counsel] between then and now?" Appellant responded, "No." The court stated, "All right. Then this motion the Court is going to rule is untimely. And I don't know that there's anything that's occurred between then and now. [¶] You certainly have a right to make one at the time of your appeal if you are not happy with your appellate attorney, if we get to that point." Appellant responded, "I appeal but he continued my case. From the beginning he told me that he did not want to continue on my case." The court ruled, "Well, this is untimely now. The trial is over. The jury has sent a note down and said they have a verdict. So we're not going to entertain a *Marsden* motion at this point."

b. Analysis

A criminal defendant is entitled to replacement of counsel where the relationship has broken down so badly that it impairs the defendant's constitutional right to counsel. (*Marsden, supra,* 2 Cal.3d at p. 123.) As a general rule, a *Marsden* motion may be made at any stage of a criminal proceeding. (*People v. Smith* (1993) 6 Cal.4th 684, 695; *People v. Stankewitz* (1990) 51 Cal.3d 72, 87.) Appellant contends the court erred in refusing to entertain his *Marsden* motion as untimely. The Attorney General, on the other hand, cites *People v. Keshishian* (2008) 162 Cal.App.4th 425, 428, for its holding that " 'the court is within its discretion to deny a last-minute motion for continuance to secure new counsel,' " and argues there was no error because, "for no reason other than his belief that his trial counsel had not wanted to represent him from the outset, appellant sought to keep the jury from delivering its verdict . . . [on what was] quite literally 'his day of judgment.' " We need not, and therefore will not, decide whether the court erred in refusing to hold a *Marsden* hearing because we conclude that any error was harmless

under any standard. (See *People v. Eastman* (2007) 146 Cal.App.4th 688, 697 [*Chapman* standard of harmless error applies, disagreed with on another point in People v. Sanchez (2011) 53 Cal.4th 80, 90, fn. 3]; see also *People v. Washington* (1994) 27 Cal.App.4th 940, 944 [defendant must show "either that his *Marsden* motion would have been granted had it been heard, or that a more favorable result would have been achieved had the motion in fact been granted"].)

In *Washington,* the trial judge never conducted a *Marsden* hearing but the Court of Appeal concluded the error was harmless. The court reasoned: "[Defendant] has made no showing here either that his *Marsden* motion would have been granted had it been heard, or that a more favorable result would have been achieved had the motion in fact been granted. The failure to rule on the motion did not affect [defendant's] trial in any way. The motion was made only *after* he had been convicted. The basis for such a motion at such a time could have been only that his attorney had acted incompetently at trial or in filing the motion for new trial [citation] or, possibly, that [defendant] believed that counsel would be unable to represent him properly at sentencing. The fact that no *Marsden* motion was entertained does not preclude [defendant] from attacking the competency of his attorney. . . . We cannot see how the appointment of a different attorney would have gained [appellant] a new trial, or could have had any effect on the sentence imposed, and we, of course, are able to review [appellant's] claims that the sentence imposed was improper. We therefore conclude that the failure to consider the purported *Marsden* motion has not deprived [defendant] of any arguments or otherwise irrevocably affected the verdict or sentence. Under the circumstances, and on the record before us, we cannot see that [defendant] would have obtained a result more favorable to him had the motion been entertained." (*People v. Washington, supra,* 27 Cal.App.4th at p. 944.)

Similarly here, appellant, who made his request only after the jury had reached its verdict, has made no showing that his counsel was ineffective or that he would have obtained a more favorable result had his *Marsden* motion been granted. On appeal, appellant argues that "*Marsden* error is typically treated as prejudicial per se," and

therefore does not fully address the effect of the error. He does speculate, "Perhaps appellant had complaints about the deliberations, jury misconduct, or other issues his counsel refused to raise." However, when asked whether anything had occurred between the time the jury began its deliberations and the day it reached its verdict, appellant responded, "No."[8] He also asserts, "perhaps appellant wanted a motion for new trial because his trial had been tainted by the attendance of an armed guard during his testimony." However, his attorney effectively represented him by objecting to the practice, and further, in light of our conclusion any error in stationing a deputy near appellant during his testimony was harmless, appellant has not shown that a different attorney would have achieved a more favorable result. The record shows beyond a reasonable doubt that any error in denying appellant's request for substitution of counsel was harmless.

DISPOSITION

The judgment is affirmed.

McGuiness, P.J.

We concur:

Pollak, J.

Jenkins, J.

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[8] As noted, appellant then went on to complain, "From the beginning he told me that he did not want to continue on my case." The record shows, however, that appellant made—and the trial court had already fully considered—the same argument during a *Marsden* hearing the court held after appellant asked for substitution of counsel earlier in the proceedings. At that time, the trial court heard from appellant and defense counsel and ruled that counsel, who had 40 years of experience "in this profession," had "properly represented" appellant and that there was no "breakdown in the relationship between [counsel and appellant] that would make it impossible for [counsel] to effectively represent [appellant]."